



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

April 26, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Baffi Simmons)

Complaint No. 2020-157

Complainant

v.

Glassboro Police Department (Gloucester)

Custodian of Record

At the April 26, 2022 public meeting, the Government Records Council (“Council”) considered the April 19, 2022 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s February 22, 2022 Interim Order because she responded in the prescribed time frame providing records upon receipt of payment and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian’s initial special service charge estimate was unreasonable. N.J.S.A. 47:1A-5(c). However, the Custodian demonstrated that she provided the Complainant with responsive records upon receipt of payment for the revised special service charge. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s February 22, 2022 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to revise the special service charge amount assessed to the Complainant to process his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall**

**promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of April 2022

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: April 27, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 26, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of  
Baffi Simmons)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-157**

**v.**

**Glassboro Police Department (Gloucester)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of:<sup>3</sup>

1. Records, reports, and notifications showing and tracking the number of police officers who triggered the [Early Warning System (“EW System”)] performance indicators, the conduct that triggered the EW System, and the remedial actions and disciplinary actions that were taken by the police department against police officers from January 2018 to the present. Please feel free to redact the names and personal identifying information about specific police officers.
2. Records showing use of force incidents involving your police officer(s) from 2018 to the present. Please include the names of the specific officer(s) involved in the incidents.

**Custodian of Record:** Samantha Bellebuono  
**Request Received by Custodian:** May 6, 2020  
**Response Made by Custodian:** July 27, 2020  
**GRC Complaint Received:** August 13, 2020

**Background**

**February 22, 2022 Council Meeting:**

At its February 22, 2022 public meeting, the Council considered the February 15, 2022 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the full nine (9)-hour charge should be calculated based solely on Lt. Rick Watt’s hourly rate. See

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<sup>1</sup> The Complainant represents the African American Research & Data Institute.

<sup>2</sup> Represented by Timothy D. Scaffidi, Esq., of the Law Office of Timothy D. Scaffidi (Woodbury, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007); Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015). Thus, the Custodian must calculate a new special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. See Palkowitz.

2. **The Custodian shall comply with conclusion No. 1 above by providing the amount of the recalculated charge available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Complainant remit payment, the Custodian shall provide access to the responsive records and simultaneously deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> to the Executive Director<sup>6</sup> within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification as described above.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On February 23, 2022, the Council distributed its Interim Order to all parties. On March 2, 2022, the Custodian e-mailed the GRC, forwarding correspondence sent to the Complainant. Therein, the Custodian stated that the revised special service charge was \$424.40, broken down to

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<sup>4</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>5</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>6</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons) v. Glassboro Police Department (Gloucester), 2020-157 – Supplemental Findings and Recommendations of the Executive Director 2

the cost to process request item Nos. 2 (\$265.12) and 3 (\$159.28). Thereafter, the Custodian provided a certification to the GRC reflecting the revised special service charge.

On April 5, 2022, the Custodian responded to the Council's Interim Order. The Custodian certified that on March 2, 2022, the Complainant responded to the Custodian's correspondence reflecting the revised charge and asserted that he would be willing to pay for the cost of processing one (1) years' worth of records responsive to item Nos. 2 & 3. The Custodian certified that on March 4, 2022, she provided the Complainant with a revised estimated total of \$169.76. The Custodian certified that on or after March 4, 2022, the Complainant submitted a money order for \$169.79. The Custodian certified that on March 22, 2022, and April 5, 2022, she submitted responsive records to the Complainant for item Nos. 3 & 2, respectively. The Custodian certified that the actual hours expended were lower than the revised estimate, and therefore the Complainant was entitled to a refund of \$115.03, and would be transmitted to the Complainant upon approval from the Borough of Glassboro ("Borough").

### **Analysis**

#### **Compliance**

At its February 22, 2022 meeting, the Council ordered the Custodian to provide the Complainant the revised special service charge within five (5) business days of the Council's Order. The Council also ordered the Complainant to remit payment of the revised special service charge or state his rejection to purchase the records, and that a failure to act within five (5) business days of receipt would be treated as a rejection of the records. The Council also ordered the Custodian to certify to the Complainant's willingness or refusal to pay the special service charge. The Council provided the Custodian ten (10) business days from receipt of the Council's Interim Order, or from receipt of payment from the Complainant, to provide certified confirmation of compliance to the Executive Director, in accordance with N.J. Court Rules, R. 1:4-4.

On February 23, 2022, the Council distributed its Interim Order to all parties. Thus, the Custodian was required to provide the Complainant with the revised special service charge by the end of business on March 2, 2022.

On March 2, 2022, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the Custodian provided the Complainant with the revised special service charge and provided the GRC with a certification confirming same. Thereafter, the parties agreed on a revised charge based on processing one (1) requested year of records for both items. On or after March 4, 2022, the Complainant provided payment to the Custodian. Then on March 22, 2022 and April 5, 2022, the Custodian certified that she provided responsive records to the Complainant.

On April 5, 2022, the same day she provided the Complainant with records responsive to item No. 2, she submitted certified confirmation of Compliance to the Executive Director.

Therefore, the Custodian complied with the Council's February 22, 2022 Interim Order because she responded in the prescribed time frame providing records upon receipt of payment and simultaneously providing certified confirmation of compliance to the Executive Director.

### **Knowing & Willful**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the instant matter, the Custodian’s initial special service charge estimate was unreasonable. N.J.S.A. 47:1A-5(c). However, the Custodian demonstrated that she provided the Complainant with responsive records upon receipt of payment for the revised special service charge. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Prevailing Party Attorney’s Fees**

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006), the Appellate Division held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008), the Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct”(quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court held that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” Id. at 603 (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney’s fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney’s fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[196 N.J. at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved"; and (2) "that the relief ultimately secured by plaintiffs had a basis in law." Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In the instant matter, the Complainant sought records and reports pertaining to the Borough's EW System as well as use of force reports for a given period. The Custodian assessed a special service charge to process the request. The Complainant filed this instant matter asserting that the estimated charge was excessive.

In determining whether the Complainant is a prevailing party entitled to attorney's fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. In accordance with the Council's February 22, 2022 Interim Order, although the imposition of the special service charge was warranted, the assessed amount was unreasonable. Thus, a causal nexus exists between this complaint and the change in the Custodian's conduct. Mason 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney's fees.<sup>7</sup>

Therefore, pursuant to the Council's February 22, 2022 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 71. Specifically, the Custodian was ordered to revise the special service charge amount assessed to the Complainant to process his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's February 22, 2022 Interim Order because

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<sup>7</sup> The Council makes this determination with the understanding that the Complainant acted on behalf of a bona fide client at the time of the request. Although the Complainant's status as representing an actual client has been previously challenged, the available evidence on the record is insufficient to address that issue herein. See Owoh, Esq. (O.B.O. AADARI) v. Neptune City Police Dep't (Monmouth), GRC Complaint No. 2018-153 (April 2020) and Owoh, Esq. (O.B.O. AADARI) v. Freehold Twp. Police Dep't (Monmouth), GRC Complaint No. 2018-155 (Interim Order dated September 29, 2020).



she responded in the prescribed time frame providing records upon receipt of payment and simultaneously providing certified confirmation of compliance to the Executive Director.

2. The Custodian's initial special service charge estimate was unreasonable. N.J.S.A. 47:1A-5(c). However, the Custodian demonstrated that she provided the Complainant with responsive records upon receipt of payment for the revised special service charge. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's February 22, 2022 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to revise the special service charge amount assessed to the Complainant to process his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado  
Staff Attorney

April 19, 2022



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

February 22, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Baffi Simmons)

Complaint No. 2020-157

Complainant

v.

Glassboro Police Department (Gloucester)

Custodian of Record

At the February 22, 2022 public meeting, the Government Records Council ("Council") considered the February 15, 2022 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the full nine (9)-hour charge should be calculated based solely on Lt. Rick Watt's hourly rate. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007); Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015). Thus, the Custodian must calculate a new special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. See Palkowitz.
2. **The Custodian shall comply with conclusion No. 1 above by providing the amount of the recalculated charge available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Complainant remit payment, the Custodian shall provide access to the responsive records and simultaneously deliver<sup>1</sup> certified confirmation of compliance, in**

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<sup>1</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director<sup>3</sup> within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification as described above.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 22<sup>nd</sup> Day of February 2022

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 23, 2022**

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<sup>2</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>3</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 22, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of  
Baffi Simmons)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-157**

**v.**

**Glassboro Police Department (Gloucester)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of:<sup>3</sup>

1. Records, reports, and notifications showing and tracking the number of police officers who triggered the [Early Warning System (“EW System”)] performance indicators, the conduct that triggered the EW System, and the remedial actions and disciplinary actions that were taken by the police department against police officers from January 2018 to the present. Please feel free to redact the names and personal identifying information about specific police officers.
2. Records showing use of force incidents involving your police officer(s) from 2018 to the present. Please include the names of the specific officer(s) involved in the incidents.

**Custodian of Record:** Samantha Bellebuono  
**Request Received by Custodian:** May 6, 2020  
**Response Made by Custodian:** July 27, 2020  
**GRC Complaint Received:** August 13, 2020

**Background<sup>4</sup>**

**Request and Response:**

On April 16, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 27, 2020, the Custodian responded in writing, stating that a special service charge would be assessed to process request item No. 1. The Custodian estimated that it would take approximately four (4) hours to complete and would be handled by Lt. Rick Watt of the Glassboro Police Department (“GPD”). The

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<sup>1</sup> The Complainant represents the African American Research & Data Institute.

<sup>2</sup> Represented by Timothy D. Scaffidi, Esq., of the Law Office of Timothy D. Scaffidi (Woodbury, NJ), and Gary M. Marek, Esq., of the Law Offices of Gary M. Marek (Mount Laurel, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons) v. Glassboro Police Department (Gloucester), 2020-157 – Findings and Recommendations of the Executive Director

Custodian stated that Lt. Watt's hourly rate was \$66.28, and the total estimated cost would be \$265.12. Regarding request item No. 2, the Custodian stated that a special service charge would be assessed and would also be fulfilled by Lt. Watt. The Custodian stated that the process would take approximately five (5) hours and total \$331.40.

#### Denial of Access Complaint:

On August 13, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the estimated special service charges were excessive. The Complainant therefore requested the GRC to reject the special service charge assessment and to award counsel fees.

#### Statement of Information:

On September 29, 2020, the Custodian filed a Statement of Information ("SOI") attaching a certification from. The Custodian certified that she received the Complainant's OPRA request on May 6, 2020. The Custodian certified that the search for records included conferences with Lt. Watt and the Borough Solicitor regarding the scope of the request and location of responsive records. On July 27, 2020, the Custodian responded to the Complainant in writing, stating that a special service charge would be assessed to process to request items at issue.

The Custodian maintained that processing the request items required a substantial and extraordinary level of work to fulfill. The Custodian included a certification from Lt. Watt, detailing the basis and justification for the charge. The Custodian asserted that the total expenditure of nine (9) hours to complete the request represents an extraordinary time and effort to produce responsive records given the size of the agency, and the disruption to Lt. Watt's regular duties. Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012); Rotimi Owoh, Esq. (O.B.O. AADARI) v. Borough of Fair Lawn (Monmouth), GRC Complaint No. 2018-146 (Interim Order dated May 19, 2020).

In his certification, Lt. Watt provided information normally requested via the GRC's 14-point special service charge analysis. Lt. Watt certified that GPD employed a total of sixty-six (66) personnel. Lt. Watt certified that he was one of three (3) Lieutenants at GPD, and his primary duties pertained to Internal Affairs matters, including disciplinary matters. Lt. Watt certified that he was also in charge of GPD's Firearms Unit, Bike Unit, and K-9 Unit.

Lt. Watt certified that processing the request could not be delegated to another party due to the sensitive nature of the records, which included juvenile matters, domestic violence matters, disciplinary matters, and other records containing private information. Lt. Watt certified that the estimated nine (9) hours of labor did not include additional time expended by the Custodian and Borough Solicitor for their roles in processing the request.

Lt. Watt certified that regarding item No. 1, a preliminary search located eleven (11) notifications stemming from the EW System. Lt. Watt certified that the actual number of records stemming from those notifications would be far greater than eleven (11) pages, since the request sought various types of "records, reports, and notifications" of the "conduct" which triggered the

EW System. Lt. Watt certified that he provided his estimate of four (4) hours to complete this portion of the request based upon his familiarity with the types of records potentially responsive to item No. 1.

Regarding item No. 2, Lt. Watt certified that a preliminary search of available records located approximately 237 separate Use of Force Reports (“UFRs”) that would be responsive to the Complainant’s request. Lt. Watt certified that based upon his familiarity with the records, he estimated that it would take five (5) hours to process this portion of the request. Lt. Watt certified that the estimate was based upon the time needed to compile the requested records, plus the average time of one (1) minute to review and redact each UFR. Lt. Watt also certified that while preliminary redactions could have been done by a Police Records clerk, he would nonetheless have to spend the identical amount of time to review the UFRs.

Lt. Watt further certified that the estimated nine (9) hours to complete the request equaled one-quarter of his entire work week. Lt. Watt also certified that the COVID-19 pandemic brought in additional unforeseen effects to GPD, including staggered work schedules and additional duties. Lt. Watt certified that one example was a major influx in firearms applications, the processing of which was one of his duties.

### **Analysis**

#### **Special Service Charge**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Whenever a records custodian asserts that fulfilling an OPRA records request requires an “extraordinary” expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5(c). In this regard, OPRA provides:

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies . . . .

[N.J.S.A. 47:1A-5(c).]

The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of the variety of factors

discussed in The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. Id. at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. Id.

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5(c). Id. at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place. Id. at 199.

The court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. Id. at 202. “[W]hat may appear to be extraordinary to one school district might be routine to another.” Id.

In Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015), the Council was tasked with determining whether a proposed special service charge was warranted and reasonable. The custodian provided to the GRC a response to its 14-point analysis request that included specific details such as the hours spent by employee, the task performed during those hours, and the hourly rate. The Council reviewed the response and found that the charge was warranted. However, the Council also found that the charge was not reasonable. Specifically, the Council found that the Borough Administrator was not the lowest paid employee qualified to perform some of the work the custodian credited him with in the 14-point analysis response. Thus, the Council adjusted the fee less the amount identified as unreasonable. Id. at 8.

In the instant matter, the Custodian argued that the estimated fee was warranted and reasonable. The Custodian argued that potentially responsive records would invariably contain sensitive information requiring review and redaction. The Custodian further asserted that Lt. Watt was the lowest paid employee capable of performing the necessary work, and that allocating nine (9) hours to process the request would substantially disrupt the performance of his other duties and responsibilities at GPD. Lt. Watt further noted GPD’s size of 66 employees and how the COVID-19 pandemic further affected the department’s daily functions. Lt. Watts contended that the estimated time was based upon allocating one (1) minute to each of the estimated 237 UFRs responsive to item No. 2, as well as reviewing the records responsive to item No. 1.

The GRC must determine whether the assessed charge was reasonable and warranted. When special service charges are at issue, the GRC will typically require a custodian to complete a 14-point analysis questionnaire prior to deciding on the charge issue. However, the facts of this complaint as presented to the GRC do not require the submission of such a questionnaire.

In first determining whether the assessed charge was warranted, the GRC compares the facts here with those in Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). There, the custodian's 14-point analysis indicated that the Borough of Fort Lee Police Department ("BPD") comprised approximately 100 employees, whereas GPD employed more than one-quarter fewer at sixty-six (66). Also, the custodian identified a member of the BPD as one of the employees capable of performing work on the request, just as the Custodian did in the instant matter. Furthermore, although the BPD estimated seven (7) hours of work to review and redact 411 pages of records compared to the nine (9) hours for an estimated fewer than 300 pages here, Lt. Watt adequately demonstrated how the allocation would have interfered with his other responsibilities in addition to handling internal affairs and disciplinary matters. Based on the foregoing, the GRC is persuaded that, in principle, a special service charge is warranted in this complaint.

However, the Council must now address whether the proposed fee is reasonable. In Courier Post, 360 N.J. Super. at 204, the court held that it would be appropriate to calculate the hourly wage rates of the clerical and professional staff involved in satisfying a request and multiplying those figures by the total hours spent, if the custodian can prove that the professional level of human resource was needed to fulfill the request. Thus, as part of the calculation of a special service charge, a custodian must prove that same was based upon the lowest paid, qualified employee's hourly rate to perform the work required to respond to the subject OPRA request. Palkowitz, GRC 2014-302. See also Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007).

Here, Lt. Watt calculated the charge based upon his own hourly rate (\$66.28) for all nine (9) hours. However, the GRC is not satisfied that this number is a correct calculation, given that Lt. Watt certified that a records clerk at the police department could have completed the task of redacting the records. Notwithstanding this admission, Lt. Watt asserted that he would still be tasked with reviewing the redactions made, and still calculated the charge based upon his hourly rate. For this reason, the estimated charge should be revised to reflect the hourly rate of the lowest paid employee capable of performing the work.

Therefore, although the Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the full nine (9)-hour charge should be calculated based solely on Lt. Watt's hourly rate. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199, 204; Janney, GRC 2006-205; Palkowitz, GRC 2014-302. Thus, the Custodian must calculate a new special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. See Palkowitz.

### **Knowing & Willful**



The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **Prevailing Party Attorney's Fees**

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the full nine (9)-hour charge should be calculated based solely on Lt. Rick Watt's hourly rate. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007); Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015). Thus, the Custodian must calculate a new special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. See Palkowitz.
2. **The Custodian shall comply with conclusion No. 1 above by providing the amount of the recalculated charge available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Complainant remit payment, the Custodian shall provide access to the responsive records and simultaneously deliver<sup>5</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>6</sup> to the Executive Director<sup>7</sup> within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the**

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<sup>5</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>6</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>7</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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**Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification as described above.**

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado  
Staff Attorney

February 15, 2022